

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Blayne K. Brisson, Petitioner, vs. City of Hewitt, Respondent.	FINDINGS OF FACT, CONCLUSIONS AND ORDER
--	--

The above entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on January 28, 2010, at the Todd County Board Room, Main Street Government Center, 347 Central Avenue, Long Prairie, Minnesota. The hearing was limited to the bifurcated issue of whether the Petitioner was a department head and therefore exempt from the protections of the Veterans Preference Act. The OAH record on this issue closed at the conclusion of the hearing that day.

Blayne Brisson (Petitioner) appeared on his own behalf without counsel.

Jana O'Leary Sullivan and Daniel T. Carlisle, Attorneys at Law, appeared on behalf of the City of Hewitt (Respondent or City).

STATEMENT OF ISSUE

Whether the Petitioner was a department head and therefore exempt from the protections of the Veterans Preference Act.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Jurisdictional and Procedural Findings

1. Petitioner is an honorably discharged veteran. He served on active duty in the U. S. Air Force from May 1974 until April 1977.¹

2. The City of Hewitt is a political subdivision of the State of Minnesota.

3. On October 7, 2009, the City terminated the Petitioner's employment as a full-time maintenance supervisor. The City did not provide the Petitioner with notice of his right under the VPA to request a hearing within 60 days of his termination.

4. On November 9, 2009, the Petitioner submitted a Petition for Relief Under the Veterans Preference Act to the Commissioner.

5. On December 4, 2009, the Commissioner issued a Notice of Petition and Order for Hearing in this matter, and this contested case proceeding ensued.

The Petitioner's Employment with the City

6. The City is governed by a City Council made up of the Mayor and four Council members. The City Council meets regularly on the second Tuesday of every month. The Mayor receives a payment of \$40 per meeting, and the Council members receive a payment of \$35 per meeting.²

7. The City hired the Petitioner as a full-time "maintenance/utility worker" in May 2002. His starting pay was \$10.50 per hour.³ At the time he was hired, the Petitioner had a Class D water supply system operator license and Class D wastewater treatment facility operator license. Shortly thereafter, the Petitioner obtained his Class C wastewater treatment operator license.⁴

8. In 2002, the City had three employees: a clerk/treasurer, the Petitioner, and Lyle Booens who worked part-time for the City mowing grass and plowing snow. Mr. Booens worked approximately 20 hours per week.⁵

9. The Petitioner's duties as the full-time maintenance/utility worker included performing routine and skilled maintenance work relating to the City's streets, grounds, parks, equipment, water system, wastewater system, and buildings.⁶ Specifically, the Petitioner was responsible for mowing grass, trimming trees and shrubs, plowing snow, repairing fences, patching potholes, laying gravel, replacing sod, responding to calls involving sewer backups or water main breaks, and arranging for underground utility

¹ Report of Separation from Active Duty attached to Petition for Relief under the Veterans Preference Act.

² Testimony of J. Mitchell.

³ Testimony of J. Mitchell and Petitioner.

⁴ Ex. 7.

⁵ Testimony of J. Mitchell.

⁶ Testimony of J. Mitchell; Ex. 1.

location services. In addition, the Petitioner was responsible for overseeing the operation of the City's water and wastewater systems, which involved regularly checking, calibrating, and replacing if necessary the systems' gauges, hoses and pumps, reading the meters, and adding chemicals to ensure the systems' proper functioning. The Petitioner was also responsible for collecting samples, recording information, and preparing monthly reports to be signed by the Mayor and submitted to the Minnesota Department of Health (for the water system) and the Minnesota Pollution Control Agency (MPCA) (for the wastewater system). The Petitioner also recommended equipment purchases, repairs and other maintenance related improvements to the City Council and provided the Council with cost estimates. Finally, the Petitioner supervised and assigned work to Mr. Booens, and performed "any additional duties at the request of the City Council."⁷

10. The Petitioner reported to and was supervised by the City Council.⁸ The Mayor and Council members prepared written evaluations of the Petitioner's performance in 2004, 2008 and 2009.⁹ By 2009, the Mayor and three Council members expressed dissatisfaction with the Petitioner's performance in several areas, including routine maintenance of equipment and responsiveness to requests or assignments from Council members.¹⁰

11. The Petitioner attended the regular monthly City Council meetings. At these meetings, the Petitioner presented a monthly maintenance report he prepared detailing the maintenance tasks that had been accomplished during the month and identifying the projects or purchases that needed to be undertaken in the future.¹¹ The Petitioner also prepared for the City Council an annual Operations and Maintenance Report that summarized the City's maintenance accomplishments and needs.¹²

12. Any purchase over \$25 required a purchase order and had to be approved by the Mayor. While the Petitioner could make recommendations regarding purchasing equipment for maintenance purposes, the ultimate authority to purchase that equipment rested with the Mayor and City Council.¹³ Likewise, requests by the Petitioner to attend training sessions or continuing education courses had to be approved by the City Council.¹⁴

13. On at least two occasions in 2004, the Petitioner requested that the City Council change his job title to Public Works Director. The Petitioner believed that the title "maintenance/utility worker" did not accurately reflect his duties, and in particular his

⁷ Testimony of J. Mitchell and Petitioner; Ex. 1.

⁸ Exs. 28, 29, 33-36.

⁹ Exs. 28, 29, 33-36.

¹⁰ Exs. 33-36.

¹¹ Testimony of J. Mitchell.

¹² Testimony of Petitioner; Exs. 8-27.

¹³ Testimony of Petitioner.

¹⁴ Exs. 9 and 13.

work involving the operation of the water and wastewater treatment plants. The Council declined the Petitioner's requests.¹⁵

14. In early March 2006, the City Council hired Aaron Fore as a part-time maintenance/utility worker after interviewing four applicants during its regular meeting on February 27, 2006.¹⁶ The City Clerk and the Petitioner were present at the Council meeting and participated in the interviews.¹⁷ Like Mr. Boones, Mr. Fore worked approximately 20 hours per week. Neither Mr. Fore nor Mr. Boones had the same licenses and certificates that the Petitioner possessed, such as a Class C driver's license and Class D water and wastewater operator licenses.¹⁸

15. With the hire of Mr. Fore, the City changed the Petitioner's title to "maintenance supervisor." The Petitioner's job description and duties for "maintenance supervisor" were nearly identical to that of the "maintenance/utility worker" except for the added duty of supervising two part-time employees instead of one.¹⁹

16. The Petitioner's supervisory duties included assigning and prioritizing daily work tasks for Mr. Boones, Mr. Fore and himself, and generally overseeing the maintenance operations for the City. The Petitioner supervised Mr. Boones and Mr. Fore and directed their work. In addition, the Petitioner prepared annual performance reviews for Mr. Boones and Mr. Fore, which were approved by the City Council, and had the authority to discipline both Mr. Boones and Mr. Fore if necessary. On one occasion, at the direction of the Mayor, the Petitioner reprimanded Mr. Fore for failing to shovel the walkway at the City office building.²⁰

17. By April 2006, Mr. Fore was performing the operational monitoring and recording duties for the water system plant on his own and without supervision on weekends.²¹

18. In 2008, Mr. Fore obtained his Class D wastewater treatment facility operator license.²²

19. In 2009, Mr. Boones retired and left his employment with the City.

20. After Mr. Boones retired, the Mayor recommended that the Petitioner's job title be changed from "Maintenance Supervisor" to "Lead Maintenance Operator" since he only supervised one part-time employee.²³

¹⁵ Testimony of Petitioner; Exs. 4-6 (City Council meeting minutes.)

¹⁶ Ex. 39.

¹⁷ Testimony of J. Mitchell; Ex. 39.

¹⁸ Testimony of J. Mitchell and Petitioner.

¹⁹ Testimony of J. Mitchell; Compare, Ex. 1 with Ex. 2.

²⁰ Testimony of J. Mitchell and Petitioner; Exs. 1, 2, 42-48.

²¹ Testimony of Petitioner; Ex. 42.

²² Testimony of Petitioner; Ex. 47.

²³ Testimony of J. Mitchell; Exs. 3 and 33.

21. In August of 2009, the League of Minnesota Cities Insurance Trust conducted an investigation on behalf of the City into allegations of misconduct by the Petitioner.²⁴

22. On September 16, 2009, the City conducted a *Loudermill* hearing to consider discipline and possible termination of the Petitioner. Those attending the hearing included the City's Attorney, Dan Carlisle, the Mayor, City Council member James Opelia and the Petitioner.²⁵

23. On October 7, 2009, the City adopted a Resolution terminating Petitioner's employment for undisclosed misconduct. The Resolution was effective immediately and was signed by the Mayor and Council member James Opelia.²⁶

24. At the time of his termination, the Petitioner was earning \$17 per hour and had both a Class C water system operator license and a Class C wastewater treatment facility operator license.²⁷

25. On October 13, 2009, the Petitioner requested a Veterans Preference hearing.²⁸

26. By letter dated October 15, 2009, the Mayor informed the Petitioner that it was the City's position that he fell within the department head exception to the Veterans Preference hearing requirement and that as a result, the City was not required to provide him with a hearing.²⁹

Other Findings

27. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

28. To the extent that the Memorandum that follows explains the reasons for these Findings of Fact and contains additional findings of fact, including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

29. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon the foregoing Findings of Facts, the Administrative Law Judge makes the following:

²⁴ Ex. 51.

²⁵ Ex. 52.

²⁶ Ex. 53.

²⁷ Testimony of J. Mitchell and Petitioner; Ex. 7a.

²⁸ Ex. 55.

²⁹ Ex. 56.

CONCLUSIONS

1. Pursuant to Minn. Stat. §§ 14.50 and 197.481, the Administrative Law Judge and the Commissioner of Veterans Affairs have the authority to determine if the Petitioner was denied a hearing under the Veterans Preference Act (VPA).

2. Petitioner is an honorably discharged veteran for purposes of Minn. Stat. §§ 197.447 and 197.46.

3. When issuing the Notice of Petition and Order for Hearing, the Department complied with all substantive and procedural requirements of statute and rule.

4. The City of Hewitt is a political subdivision of the State of Minnesota within the meaning of Minn. Stat. § 197.46, and its personnel practices are therefore subject to the provisions of the VPA.

5. The Veterans Preference Act prohibits the removal of a veteran from public employment except for incompetence or misconduct shown after a hearing, upon due notice and upon stated charges in writing.³⁰

6. The legislature has exempted from the Veteran's Preference Act the following positions: private secretary, superintendent of schools, **or one chief deputy of any elected official or head of a department**, or any person holding a strictly confidential relation to the appointing officer.³¹

7. Typically, a veteran has the burden of proving a violation of the Veterans Preference Act.³² The burden of establishing the department-head exemption, however, is on the appointing authority.³³

9. The City has failed to establish that the Petitioner's "Maintenance Supervisor" position is a department-head position that is exempt from the Veterans Preference Act.

10. The Veterans Preference Act provides that the public employer must notify the veteran in writing of its intent to discharge the veteran, any charges against the veteran, and the veteran's right to a veteran's preference hearing within 60 days of receiving the notice.³⁴

11. The Petitioner was not given written notice of the City's intent to terminate for cause and his right to a hearing within sixty (60) days of October 7, 2009, pursuant to Minn. Stat. § 197.46.

³⁰ Minn. Stat. § 197.46.

³¹ Minn. Stat. § 197.46 (emphasis added).

³² Minn. R. 1400.7300, subp. 5.

³³ Minn. Stat. § 197.46; *Holmes v. Wabasha County*, 402 N.W.2d 643 (Minn. App. 1987).

³⁴ Minn. Stat. § 197.46.

12. The Petitioner is entitled to a hearing to determine whether he was incompetent of committed misconduct within the meaning of Minn. Stat. § 197.46 justifying his removal from his position with the City.

13. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

Based upon the foregoing Conclusions and for the reasons described in the Memorandum that follows, the Administrative Law Judge makes the following order:

ORDER

IT IS HEREBY ORDERED THAT:

This contested case hearing will be reconvened on a date and at a location in Todd County to be determined to address and present evidence and argument on the following issues:

1. Whether the Petitioner was incompetent or committed misconduct within the meaning of Minn. Stat. § 197.46 justifying removal from his position with the City.
2. Whether the Petitioner is entitled to reinstatement, back pay, and benefits before or after the discharge hearing, and any offsets to which the City may be entitled.³⁵
3. The foregoing Findings and Conclusions shall be incorporated into the Final Report of the Administrative Law Judge issued after the reconvened hearing.

Dated: April 7, 2010

/s/ Steve M. Mihalchick

STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Digitally Recorded

³⁵ A veteran who is involuntarily removed from his position by a public employer without first receiving the written notice and hearing is entitled to reinstatement and back pay from the date of his removal until properly discharged in accordance with the Veterans Preference Act. *Mitlyng v. Wolff*, 342 N.W.2d 120, 123 (Minn. 1984) (holding VPA entitles a veteran to be paid until discharge occurs.); *Tombers v. City of Brooklyn Center*, 611 N.W.2d 24, 26 (Minn. App. 2000); *Pawelk v. Camden Township*, 415 N.W.2d 47, 51 (Minn. App. 1987); *Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401 (Minn. App. 1987).

MEMORANDUM

The Veterans Preference Act prohibits public employers from discharging a veteran “except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.”³⁶ However, that Act does not apply to persons employed as “one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer.”³⁷ While this section does not expressly exempt department heads, the Minnesota Supreme Court has determined that department heads are excluded by implication because of the statute’s explicit exclusion of chief deputies of department heads.³⁸

The exemption is a narrow one and is limited to persons in positions with authority comparable to that of an elected official, who are vested with discretion in the performance of their duties, “not subject to direction from superior authority but on the contrary possessing the necessary authority to appoint clerks and subordinates.”³⁹ The “head of a department” ordinarily means the head of some government division that is important enough to have a deputy. The Minnesota Supreme Court has held that, while cases may arise in which a department has only one employee, who thereupon would be the head of the department, “we believe that ordinarily, before anyone could be classified as a head of a department, the department must be sufficiently important as to include more than one employee.”⁴⁰

The Minnesota Supreme Court has identified several other factors to consider in determining whether the position at issue is a department head, including:

1. Does the alleged department head have charge of the work done by his department?
2. Does his work require technical, professional training?
3. Is he the highest authority at that level of government as to his official duties?
4. Does he supervise all of the work in his department?
5. Does the success of his department depend on his technique?
6. Are the employees in the department under his direction?
7. Are his duties more than merely different from other employees?
8. Does he have power to hire and fire subordinates?⁴¹

³⁶ Minn. Stat. § 197.46.

³⁷ *Id.*

³⁸ *State ex rel. Sprague v. Heise*, 243 Minn. 367, 67 N.W.2d 906, 911 (1954); *State ex rel. McOske v. City Council of Minneapolis*, 167 Minn. 240, 208 N.W. 1005 (1926).

³⁹ *Sprague*, 67 N.W.2d at 911, *citing McOske*, 208 N.W. at 1006.

⁴⁰ *Sprague*, 67 N.W.2d at 912.

⁴¹ *State ex. rel. McGinnis v. Police Civil Service Commission*, 253 Minn. 62, 91 N.W.2d 154, 163 (1958).

Many of the factors identified for determining whether someone is a department head have little relevance when, as in this case, there is only one full-time person in the “department” with one or two part-time employees. The full-time person will necessarily “have charge of the work done” in the department and be responsible for the success of the department’s work. Here, the City established that the Petitioner supervised Mr. Fore and Mr. Boones and assigned and directed their daily (part-time) work. However, the evidence presented also established that the Petitioner did not have the authority to hire and fire subordinates, nor was he the highest level of authority with respect to his own official duties. Instead, the record is clear that the Petitioner reported to and was supervised by the City Council whose members could assign him additional duties and had the ultimate authority to reject or approve his recommended purchases, suggested improvements, or training requests. In addition, many of the duties that Petitioner carried out were similar to those performed by Mr. Fore and Mr. Boones. For example, all three took care of the grounds and snow plowing on occasion, and Mr. Fore would often assist the Petitioner with tasks such as repairing fences, setting up holiday decorations, and replacing water meters.⁴² And while it is true that the Petitioner was the main person in charge of monitoring and overseeing the operation of the City’s water and wastewater treatment plants, Mr. Fore took over those duties early on in his employment on the weekends he worked.

Based on the record, the Administrative Law Judge concludes that the Petitioner’s Maintenance Supervisor position was not one that had authority comparable to that of an elected official, with discretion to set policy, or even the ability to hire or fire anyone else. In *State ex rel. Sprague v. Heise*, the Supreme Court determined that a building inspector was not a department head because he was the sole employee doing that type of work; he had no power to hire or fire subordinates; he had no discretion in fixing fees; he was answerable to the village council; and while he had a part-time clerk who kept the records, he could neither hire nor fire her nor otherwise control her work.⁴³ The situation is similar in this case. The City Council has reserved for itself the power to hire and fire employees, as well as the authority to direct the Petitioner’s work and purchasing decisions. The Petitioner’s budget, purchases, staff, and duties were subject to the direct control of the City Council. Moreover, the Council rejected Petitioner’s request early on to be named “Public Works Director,” and later recommended changing his title from Maintenance Supervisor to “Lead Maintenance Operator” when Mr. Boones retired. These decisions suggest that the City did not perceive the Petitioner to be a department head but rather simply the City’s lead and

⁴² See, Exs. 13, 14, 19 and 20.

⁴³ 67 N.W.2d at 912; see also *State ex rel. Caffrey v. Metropolitan Airports Commission*, 310 Minn. 480, 486-87, 246 N.W.2d 637, 641 (1976) (director of public affairs was not a department head where he did not report directly to the Commission but was subject to the authority and supervision of others; he and his secretary were the only employees in the department; and he did not have authority to hire or fire others); *Holmes v. Board of Commissioners*, 402 N.W.2d 642 (Minn. App. 1987) (individual serving as zoning administrator, agricultural inspector, and civil defense director for county who was assisted in each area only by a secretary was not a department head where his duties were largely ministerial, he was subject to board directives in matters requiring the exercise of discretion, and he lacked authority to hire or fire his secretary or other subordinates).

only full-time maintenance employee. On balance, based upon a consideration of all the factors identified in *Sprague* and *McGinnis*, the Administrative Law Judge concludes that this position is not a department-head position that is exempt from the Veterans Preference Act. The position simply did not have the requisite level of authority, responsibility, and independence of action necessary to be a department head.

Therefore, this matter will be set on for a further contested case hearing on a date to be determined, to address whether the Petitioner was incompetent or committed misconduct within the meaning of the Veterans Preference Act justifying his removal from his position with the City.

S.M.M.